6-25-1975

James Riley Scrivener v. Commonwealth of Kentucky

Appellant's Brief 1975-SC-0426

KYSC1975-SC-0426-01
{23774211-9FD3-41A6-8DA6-C62982DF26DF}
{135159}{54-130814:111511}{062575}

APPELLANT'S BRIEF

539 SW2d 291

3666

COURT OF APPEALS OF KENTUCKY

File No. 75-426

JAMES RILEY SCRIVENER — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
CRIMINAL BRANCH, FIRST DIVISION
HON. S. RUSH NICHOLSON, JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLANT

GEOFFREY P. MORRIS
STAFF ATTORNEY
JEFFERSON DISTRICT PUBLIC DEFENDER
1000 REPUBLIC BUILDING
LOUISVILLE, KENTUCKY 40202
(502) 584-1211
ATTORNEY FOR APPELLANT

MICHAEL A. WRIGHT
LEGAL INTERN

PAUL G. TOBIN
JEFFERSON DISTRICT PUBLIC DEFENDER
OF COUNSEL

This is to certify that a copy of this Brief has been served upon the Honorable Ed Hancock, Attorney General, Attorney for Appellee, the Honorable S. Rush Nicholson, trial judge, and the Honorable Edwin A. Schroering, Commonwealth Attorney, pursuant to RCA 1.250 by mailing a copy to their respective addresses, this the 25th day of June, 1975.

GEOFFREY P. MORRIS
ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

I

STATEMENT OF THE QUESTIONS PRESENTED

1. DID THE TRIAL COURT COMMIT ERROR BY HAVING THE APPELLANT STAND TRIAL IN THE DISTINCTIVE ATTIRE OF A PRISONER, THUS DENYING HIM HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL?

2. WAS CONSTITUITIONAL ERROR DENYING THE APPELLANT A FAIR TRIAL COMMITTED BY THE TRIAL COURT IN HAVING EVIDENCE OF PRIOR CHARGES WHICH WERE DISMISSED OR FILED AWAY INTRODUCED WHILE TRYING TO ESTABLISH PROOF OF PRIOR CONVICTIONS FOR PURPOSES OF ENCHANCEMENT OF PUNISHMENT UNDER KRS 431.190?

COURT OF APPEALS OF KENTUCKY

File No. 75-426

JAMES RILEY SCRIVENER — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
CRIMINAL BRANCH, FIRST DIVISION
HON. S. RUSH NICHOLSON, JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLANT

May it please the court:

II

STATEMENT OF THE CASE

A. STATEMENT OF THE NATURE OF THE PROCEEDINGS

The November, 1974 Jefferson County Grand Jury returned an indictment, No. 152943, against the Appellant, James Riley Scrivener, charging him with violation of KRS 433.120(1), burglary, and KRS 431.190, the Habitual Criminal statute (Transcript of Record, p. 2, hereinafter referred to as T.R.). On March 5 and 6, 1974 James Riley Scrivener was tried, and on March 6, 1974 the jury returned a verdict of guilty on both counts of the indictment and fixed his punishment at "life" in the penitentiary. The Appellant filed a motion and grounds for a new trial on March 11, 1975, setting forth in detail the alleged errors which occurred during the trial (T.R. 12). That motion was overruled on March 14, 1975 (T.R. 13); the notice of appeal was filed on March 18, 1975, and this appeal followed (T.R. 15).

B. STATEMENT OF THE FACTS

The Appellant was brought into court by members of the Security Guard of LaGrange Reformatory on March 5, 1974 (T.R. 6). Because he was wearing prison clothing with a distinctive prison number printed across the back of his shirt, counsel promptly moved for a continuance in order to avoid prejudice resulting from his being seen by prospective jurors in such a uniform (Transcript of Evidence, p. 3, hereinafter referred to as T.E.). After a discussion in chambers with the trial judge, the motion was overruled (T.E. 4). A jury was selected from the panel present in the courtroom, and the trial proceeded with the defendant still attired in his prison clothing (T.E. 6-37).

During the course of the trial, in charging the defendant as an habitual criminal on the basis of three prior felony convictions, the Commonwealth asked a clerk to read from the official court order book. While doing so, the clerk read into evidence several charges which were filed away and some which were dismissed (T.E. 73,75, 78). Prior to his testimony, counsel for the Appellant had objected to having the entire orders read, as they contained offenses which were disposed of or filed away (T.E. 70). This objection was overruled by the court (T.E. 71).

The Appellant subsequently took the stand in his own defense and testified while still wearing his prison clothing with identification number (T.E. 84). The jury, subsequently, returned a verdict of guilty on both counts of the indictment.

III

ARGUMENT

1. THE TRIAL COURT COMMITTED ERROR BY HAVING THE APPELLANT STAND TRIAL IN THE DISTINCTIVE ATTIRE OF A PRISONER, THUS DENYING HIM HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The ABA Standards Relating to Administration of Criminal Justice - Function of Trial Judge, §5.3(a) states, "The trial judge should not permit a defendant or witness to appear at trial in the distinctive attire of a prisoner"; and, ABA Standards to Trial by Jury, §4.1(b) says, "An incarcerated defendant or witness should not be required to appear in court in the distinctive attire of a prisoner or convict". The commentary to the last section says that the purpose for such a standard is to "prevent the appearance of a defendant... in garments which in effect are a brand of incarceration". It requires very little analysis to understand why the standard was adopted or why a "brand of incarceration" must be avoided at the trial of an accused felon. Implicit in our judicial and social systems is the time-honored and long protected concept that a person is innocent until proof of guilt beyond a reasonable doubt. Indeed, as the court stated in Eaddy v. People, 115 Colo. 448, 174 P.2d 717, 718 (1946):

> ..."It is difficult to find any distinction as to the humiliation involved, between requiring a prisoner to wear the words 'County Jail' branded upon his clothing and requiring him to wear them on a placard attached about his neck; either is a mockery, an indignity and a humiliation not consonant with innocence and freedom. The presumption of innocence requires the garb of innocence, and regardless of the ultimate outcome, or of the evidence awaiting presentation, every defendant is entitled to be brought before the court with the appearance ...of a free and innocent man..."

The distinction between Eaddy, supra, and the Appellant's case is that he was "branded" with "05518" instead of "County Jail". The Appellant submits there is little difference in effect on the minds of jurors.

The issue has been litigated more recently by the 5th Circuit Court in Hernandez v. Beto, 443 F.2d 634, cert. denied 404 U.S. 897, 92 S.Ct. 201, 30 L.Ed.2d 174. There the court said succinctly that the practice of trying a man in prison clothing infringed on a fundamental right of the accused, that is, the presumption of innocence. See, also, Thompson v. State of Texas, 514 S.W.2d 275 (1974).

This Court has recognized in a number of cases that at certain times it may be necessary to order the defendant tried in manacles or to have him bound in some other manner. See Marion v. Commonwealth, 269 Ky. 729, 108 S.W.2d 721 (1937); Blair v. Commonwealth, 171 Ky. 319, 188 S.W. 390 (1916); and, Bowman v. Commonwealth, 261 Ky. 215, 87 S.W.2d 355 (1935). But such decisions are reached after a finding by the trial court that such restraint is necessary in order to prevent disorder, violence, or the like. Bowman, supra. No such reason can be justified causing an orderly defendant to be tried in penitentiary attire. What possible harm is to be prevented by requiring or allowing prison dress, replete with glaring identification number, in a courtroom?

What the Appellant asks will create no major problems in administration of criminal justice. When arrested, every man is attired in some form of civilian dress. Cannot these clothes be used for court appearances? The Appellant does not necessarily request the right to be tried in a new suit and tie, but only an opportunity to present his defense with some dignity and without the embarrassment of having a large printed number across his back.

It is difficult to conceive of a case where trying a man in prison clothes had a more damaging affect at trial. See ABA Standards, supra, and Eaddy v. People, supra. And, clearly in light of the test in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, rehearingdenied 386 U.S. 987 (1967) the error must be concluded to be prejudicial.

The Appellant sat through the entire trial bearing an identifying number "05518". In order to testify in his own behalf, he was required to parade past the jury wearing that humiliating dress. Further, as the Commonwealth presented evidence of the Appellant's past criminal activity in minute detail, he sat stamped 'guilty" from head to foot. And, an examination of the record will show glaring weaknesses in the case against the Commonwealth--weaknesses which may have given reasonable men reasonable doubt as to the Appellant's guilt if he had not sat across the room already identified as "guilty as charged".

For instance, note that the Commonwealth had no fingerprints to connect the Appellant with the break-in and burglary (T.E. 69), and the questionable identification of Appellant by the next-door neighbor made from a distance of more than ten (10) feet, at night through venetian blinds, two of which windows he admitted were small and located very high (T.E. 50, 51, and 53). The Appellant asserted that he was arrested away from the scene and then taken to the house (T.E. 84-86). If not for the prison clothes, this may have been viewed by the jury as more credible when we consider the lack of explanation by Officer Murphey of how the Appellant arrived at the scene of the alleged break-in and lack of explanation of how he was supposed to effect flight from the scene (T.E. 68). Given all these facts and but one conclusion can be reached--it is possible that a juror, given no prejudicing factors, could find reasonable doubt as to Appellant's guilt. The balance sought to be maintained is a delicate one. As this honorable Court is quite aware, a juror must weight charge and counter charge to achieve his verdict. One prevailing reminder of past criminal activity, such as prison dress, confronting the juror at every turn and that balance is permanently upset with a bias, though perhaps unconscious, toward prosecution. Perhaps it was stated best by David Herbert of the Ohio Bar when he said "...the only standards that can be utilized by the jury in forming a judgment [is what the witnesses say]...and the defendant's appearance. [They] judge a book by its cover...", 21 Practical Lawyer, 85, 86.

The trial court committed prejudicial error in allowing the Appellant to be tried in prison clothes. The ABA Standards and a number of circuit courts and state courts have stated what should be an obvious truth, "The presumption of innocence requires the garb of innocence."

2. CONSTITUTIONAL ERROR DENYING THE APPELLANT A FAIR TRIAL WAS COMMITTED BY THE TRIAL COURT IN HAVING EVIDENCE OF PRIOR CHARGES WHICH WERE DISMISSED OR FILED AWAY READ INTO EVIDENCE WHILE TRYING TO ESTABLISH PROOF OF PRIOR CONVICTIONS FOR PURPOSES OF ENHANCEMENT OF PUNISHMENT UNDER KRS 431.190.

Under count Two (2) of Indictment No. 152943, the Appellant was charged with being a repeated offender and the jury, after deliberation, found him guilty under KRS 431.190. That statute provides:

> Conviction of felony -- Punishment on second and third offenses. Any person convicted a second time of felony shall be confined in the penitentiary not less than double the time of the sentence under the first conviction; if convicted a third time of felony, he shall be confined in the penitentiary during his life. Judgment in such cases shall not be given for the increased penalty unless the jury finds, from the record and other competent evidence, the fact of former convictions for felony committed by the prisoner, in or out of this state.

The Appellant does not challenge the constitutionality of the statute itself, but recognizes the long history of litigation on that very point. See Hampton v. Whaley, 313 Ky. 611, 233 S.W. 2d 273 (1950); Barber v. Thomas, Ky., 355 S.W.2d 682 (1962); and Jones v. Commonwealth, Ky., 401 S.W.2d 68 (1966). Indeed, the Supreme Court of the United States has upheld the validity of recidivist statutes such as Kentucky's. See Spencer v. Texas, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606, reh. denied 386 U.S. 969. But the Appellant does submit that it was prejudicial error to read into evidence charges which were either dismissed or filed away while presenting proof of those former convictions.

As this Court said in 1974, "Proof of prior felony convictions in an habitual criminal case (KRS 431.190) is established by reading into evidence the judgments or prior convictions contained in the order books of the trial court". Johnson v. Commonwealth, Ky., 516 S.W.2d 649, 650 (emphasis ours). There the Court dealt with the admissibility of reading the indictment of prior felonies into the record and concluded as a general rule that it was not permitted, and that to do so constituted error. The Appellant wishes to stress

the language "evidence of prior convictions" from the Johnson case, supra. Counsel for the Appellant made no objection or motion concerning the introduction of evidence of former convictions. Instead, he objected to the introduction into the trial of charges for which he had not been convicted. Of what possible use are they under the statute? None. Under KRS 431.190, only prior convictions could be used to enhance punishment under the laws of the Commonwealth. But, clearly, the effect of reading untried charges is powerful. A lengthy recitation of all past offenses for which a man has been charged, coupled with his appearance in a penitentiary uniform, cannot but help to prejudice the minds of the jurors.

Perhaps this point can best be seen by analyzing the impact of a case heard in the United States Supreme Court after Spencer, supra. Spencer had held that the Texas recidivist statute was not unconstitutional per se. As Mr. Justice Harlan said, "The defendant's interests are protected by limiting instructions,...and by the discretion residing with the trial judge to limit or forbid the admission of particularly prejudicial evidence...", Spencer, supra, at 561. There, and elsewhere through the opinion, one can see that the Court feels that with use of recidivist statutes the accused's rights must be carefully guarded so as not to abuse the power granted the prosecution in establishing its proof.

Later, in Burgett v. State, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967), the Supreme Court was faced with the task of defining the limit that the prosecution can go to in proceedings under recidivist statutes. There the Court ruled that illegally obtained convictions could not be introduced for purposes of enhancement of punishment under recidivist statutes. Mr. Chief Justice Warren, speaking in a concurring opinion stated, "This case is a classic example of how a rule eroding the procedural rights of a defendant on trial for his life or liberty can assume avalanche proportions, burying beneath it the integrity of the fact-finding process...In this case, that harsh rule was expanded to a degree close to barbarism." Burgett, supra, at 117.

Is it sound, then, to allow reading of untried charges while excluding illegal convictions? Both place before the jury the suggestion of wrongdoing for which no conclusive adverse judgment has been had. And the one, dismissed charges and filed away charges, places before the jury a suggestion of wrongdoing for which no criminal prosecution was even attempted. What would be the next logical step toward expanding the Spencer rule to "degrees of barbarism"? Could we next allow the prosecution to introduce evidence that a defendant had been observed by court order for suspected activities for which no charge was even made? The merits of the Kentucky recidivist statute have been argued long and hard, but always there was an attempt to protect the rights of the accused and to administer justice with a recognition of the standards of a fair trial. To allow dismissed charges and those which were filed away read into evidence for purposes of enhancement of punishment will only allow for greater opportunity for jury prejudice by recounting in detail defendant's past encounters with the police--encounters which may have proved innocent and which certainly were not felt strong enough by the Commonwealth, at the time, to pursue prosecution; and will, in a moment, undo all attempts to preserve the rights of the defendant under the Habitual Criminal Statute.

The Appellant urges this Court to stand firm, as it has in the past, and protect the rights of the accused to a fair trial, free from any possible suggestion of prejudice.

The trial court committed prejudicial error in allowing those charges which were filed away and dismissed to be introduced. Under the Kentucky recidivist statute, KRS 431.190, only evidence of prior convictions is admissible. To allow more is an assault upon the rights of the defendant to a fair and impartial trial and can only serve to prejudice the minds of the jurors. While ruling in Spencer v. Texas, supra, that recidivist statutes like our own are constitutional, the United States Supreme Court said in Burgett v. State of Texas, supra, that prosecutions under them must be closely watched, for the right to a fair trial hangs in the balance.

IV

CONCLUSION

For the foregoing reasons, the Appellant respectfully requests that the judgment be set aside, and that he be granted a new trial.

Respectfully submitted,

GEOFFREY P. MORRIS
STAFF ATTORNEY
JEFFERSON DISTRICT PUBLIC DEFENDER
1000 REPUBLIC BUILDING
LOUISVILLE, KENTUCKY 40202
(502) 584-1211
ATTORNEY FOR APPELLANT

MICHAEL A. WRIGHT
LEGAL INTERN

PAUL G. TOBIN
JEFFERSON DISTRICT PUBLIC DEFENDER
OF COUNSEL